85-6461

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EARLINE MARTIN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ORIGINAL

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

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4 Opp

NO. _____

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EARLINE MARTIN,

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Respondent.

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

---

Petitioner, Earline Martin, moves this Court for an Order permitting her to proceed in this Court in forma pauperis with her Petition for Writ of Certiorari to review the judgment and final order of the Supreme Court of Ohio (State v. Martin, 21 Ohio St. 3d 91 [January 15,1986]). The petitioner's separate affidavit in support of this Motion is attached hereto.

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IN THE UNITED STATES SUPREME COURT

EARLINE MARTIN

vs. NO. _____

STATE OF OHIO

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
ON APPEAL IN FORMA PAUPERIS

I, Earline Martin, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are set forth in the Petition for Writ which will be forwarded to the Court. These we incorporate by reference.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   No.

   Date of last employment: November, 1980.

   Amount of salary and wages per month which you received: $800.00 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources?

   No.

3. Do you own any cash or checking or savings account?

   No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

No dependents.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Earline Martin
EARLINE MARTIN

SUBSCRIBED AND SWORN TO before me this 24 day of July 1986.

Sheila S. Bowman
NOTARY PUBLIC

Sheila S. Bowman, Notary Public
[illegible] County, [illegible]
My commission expires 6-23-[illegible]

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EARLINE MARTIN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

---

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## QUESTIONS PRESENTED

I

Where the facts show an accused was victimized by a prosecutor's egregious summations the question as to whether the remarks made deprived the accused of a fair trial cannot be subordinated by a reviewing court to the mere mechanical inquiry as to whether they "are convinced beyond a reasonable doubt, that even absent the prosecutor's statements, the jury would have found" the accused guilty.

II

Whether due process is violated when the jury may have been misguided by conflicting instructions and one (or more) of the instructions is a prejudicially incorrect statement of the law.

III

Whether due process is denied when the trial judge instructs the jury in categorical language that only if they found the accused not guilty of the charged offense (here aggravated murder) should they even consider any lesser included offenses and if they found the accused guilty of such offense they need not consider any lesser charge.

IV

Can a State constitutionally require an accused who defends against a murder charge on the grounds of self-defense to prove themselves not guilty.

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

---

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Earline Martin, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, which judgment was rendered and became final on January 15, 1986.

## OPINIONS OF THE COURTS BELOW

The opinion of the Supreme Court of Ohio, the judgment to which this Petition is directed, is set forth as Appendix "A" to this Petition. It is also formally reported as State v. Martin, 21 Ohio St. 3d 91 (1986).

The Journal Entry and Opinion of the Ohio Court of Appeals, dated November 21, 1984, is designated Appendix "B".

## STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on January 15, 1986. The jurisdiction of this Court is invoked under Title 28 U.S.C., §1257 (3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in this case are:

(1) Fourteenth Amendment, United States Constitution.

(2) Revised Code of Ohio, §2901.05.

(3) Revised Code of Ohio, §2903.03.

(4) Revised Code of Ohio, §2929.71.

## STATEMENT OF THE CASE [1/]

Earline Martin was found guilty, by a jury, "as charged by the Judge" of Aggravated Murder (under favor of R.C. of Ohio, §2903.01 and §2929.71) and was given a life sentence. The appeal on questions of law from the verdict and final order entered by the trial court resulted in an affirmance of the conviction.

The facts in this cause, as distilled by the Ohio Supreme Court, show that:

> On the morning of July 21, 1983, appellant, Earline Martin, shot to death her husband, sixty-eight-year-old Walter C. Martin, Sr., after an argument over grocery money. Appellant was arrested and charged with aggravated murder pursuant to R.C. 2903.01.
>
> Appellant pleaded not guilty and, at trial, raised the affirmative defense of self-defense. Appellant took the stand and testified she feared for her life because the victim had struck her just prior to the fatal shooting. In closing argument, the prosecutor characterized appellant's testimony as a sham, amounting to a lie.

1/ References to the transcript of proceedings will be designated by the prefix "R".

> Appellant requested and received jury instructions on self-defense. At the close of evidence and argument, the trial judge instructed the jury on the offense of aggravated murder and the lesser-included offenses of murder and voluntary manslaughter. The trial court instructed the jury that it should not consider any lesser-included offense if the jury first found that the state had proved beyond a reasonable doubt all of the elements of the offense of aggravated murder.

Appendix "A", infra, at A 1 - A 2, 21 Ohio St. 3d, at 91-92.

Additionally the facts show the Supreme Court of Ohio credited our contention that "the prosecutor's remarks in closing argument, characterizing ... [petitioner's] testimony as a fabrication, were substantial prejudicial error" (id., at A 5 and 95). The Court then rather typically concluded, in effect, that the fundamentals of a fair trial need not be observed by prosecutors if they are convinced a reviewing Court will find sufficient proof in the Record to support a finding of guilt. This idea the Court validated by resolving itself into an appellate jury and then determining on this Record "that even absent the prosecutor's statements, the jury would have found ... [her] guilty" (ibid).

The Record also shows the trial court, despite our very precise objections and exceptions, instructed the jury that the defendant, to prevail on the basis of her self-defense plea, was required to actually prove her innocence. Indeed as the self-defense arguments made below (which have the support of the two dissenting Justices of the Ohio Supreme Court and one of the three judges on the Court of Appeals) make most clear, the instructions herein being assailed simply cannot be defended.

As to the other flawed instructions, dealing with the inter-relationships between the aggravated murder charge and its included offenses, the contention will be made that they were not only confusing and unintelligible, they were also contradictory.

## ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

History could very well record, if it happens, that the selection of this particular case to resolve the issues here involved was, both, wise and timely. For the issue as to whether a State can require an accused to prove their innocence when they defend solely on the grounds of self-defense will not go away simply because the Ohio Supreme Court, in a five to two decision, has apparently satisfied itself that such is the case.

Moreover, the aptness of this Court's selection of this particular case will be applauded by those of us who are convinced the Ohio Supreme Court and its various Appellate courts (including the one below) are dead wrong in their analysis of these issues. Indeed, the majority's reliance on State v. Moran, ___ U.S. ___, 105 S. Ct. 350 (1984), is really a godsend because of the misguided focus it gives to our self-defense arguments. Significantly, the Court of Appeals specifically recognized that it had already "dealt with a nearly identical [issue] in State v. Moran, No. 45879...." (See Appendix "B", p. A 11). And the Supreme Court of Ohio specifically cited Moran in support of its ultimate thesis (Appendix "A", at A 4 and State v. Martin, 3 Ohio St. 3d at 94), which fact should weigh heavily in favor of the granting of this Petition.

It was, of course, in Moran v. Ohio, ____ U.S. ____, 105 S. Ct. 350 (October 29, 1984), that counsel apparently got the attention of some of the members of this Court. For it was here that Justice Brennan, in a dissent from the denial of certiorari, articulated an analysis of this issue that can be favorably compared to that urged in the various dissenting opinions rendered in the reviewing courts below. It is substantially this same position that the petitioner has taken in her discussions of these issues below.

While no abridgement of the specific analysis can do it justice, the following selected segments from Moran seem especially apt:

> The Ohio aggravated murder statute states that "[n]o person shall purposely, and with prior calculation and design, cause the death of another." Ohio Rev. Code §2903.01(a) (1982). Under Ohio law, an assertion of self-defense requires proof inter alia that the defendant "was in imminent danger of death or great bodily harm." State v. Robbins, 58 Ohio St. 2d 74, 74, 388 N.E. 2d 755, 755 (1979) (emphasis added). To place the burden of proof on the defendant asserting self-defense therefore seems to require the defendant to prove he acted when in imminent danger of great bodily harm, and thus to negate the prosecution's burden of proving that the defendant acted "purposely, and with prior calculation and design."
>
> On a slightly broader reading of Patterson, sources of Ohio law outside its murder statute may be relevant in determining what elements constitute the crime of aggravated murder in that State. In Engle v. Isaac, 456 U.S. 107 (1982), respondents sought to review the denial of their habeas petitions, in which they raised virtually the identical claim raised by petitioner here.
>
> * * *
>
> To assert (as the Ohio appellate court here did) that self-defense is not an element of the crime of aggravated murder is to assert that the State may punish a defendant with life imprisonment (the penalty faced by petitioner) for that offense even if the killing was done in the purest self-defense. Yet both the Due Process Clause and the Eighth Amendment may restrict the State's ability to so punish a defendant whose "crime," for example, consisted of an immediate response to a murderous attack upon him. See Patterson, supra, at 210; Solem v. Helm, ___ U.S. ___ (1983). If either of these constitutional provisions do so restrict the State, it is difficult to resist the conclusion that absence of self-defense is an element of every aggravated murder charge -- an element required by the Constitution even if not by the State's enacted or decisional law.

Moran v. Ohio, 105 S. Ct., at 354-355. (Dissenting Opinion.)

When we add to the above quote the Court's recent decision of Francis v. Franklin, ____ U.S. ____, 105 S. Ct. 1065 (April 29, 1985), which makes an analysis similar to the ones made in the Moran dissent and by the dissenting Judges on the Courts below, the die seemingly has been cast in favor of an outright repudiation and rejection of the self-defense theories espoused by the majorities below.

Also, this Court is being called on to reject the equally flawed analysis relied on by our reviewing courts in their defense of all the various instructional issues discussed below.

ARGUMENT NO. I

When Addressing A Showing That An Accused Was Victimized By A Prosecutor's Egregious Summation, Which Was Expressly Approved By The Trial Judge, The Question As To Whether The Remarks Made Deprived The Accused Of A Fair Trial Cannot Be Subordinated By A Reviewing Court To The Mere Mechanical Inquiry As To Whether They "Are Convinced Beyond A Reasonable Doubt, That Even Absent The Prosecutor's Statements, The Jury Would Have Found" The Accused Guilty.

It is the law everywhere, including Ohio, that the prosecutor is barred from expressing his or her personal opinion on any of the issues in the case, including credibility. See, State v. Thayer, 124 Ohio St. 1 (1931) and State v. Smith, 17 Ohio St. 3d 13 (1984).

This is so because when a prosecutor asserts her personal beliefs as to the credibility of the accused, as was done here with the Judge's express approval, such comments impinge on the jury's function of determining the guilt or criminal liability of the accused. Also, comments of this ilk inject into the case irrelevant and inadmissible matters and considerations not legally produced as evidence. When viewed in this sense, it is apparent that by expressing her opinions and beliefs, the prosecutor sought to increase the apparent probative force of the State's proof by virtue of her personal influence, her presumptive superior knowledge of the facts and background of the case, and the influence of her official position. See 5 Wharton, Criminal Law and Procedure, §2084 (R. Anderson Ed. 1957); 6 Wigmore, Evidence, §1806 (3rd Ed. 1940); Anno, 50 American Law Review, 2d 766 (1956).

All this being so, the prosecutor's argument that Earline Martin had actually lied in her own evidence (R. 651) and was a "liar" (R. 652) clearly suggested that the prosecutor had some private information supporting her unequivocally stated beliefs. Further, we contend that where (as here) the transgressions involve the prosecutor, what is required is a stricter adherence to the proper side of the line than might otherwise be the case because the chances of prejudice are surely greater.

Clearly, because the prosecutor as a public official occupies an exalted position, when they are allowed to testify as this prosecutor did in her summations, the jurors are convinced they actually heard "expert" testimony by one of their public officials on some of the most significant issues in the case. In assaying our discussion of this issue, consider the A.B.A. Code of Professional Responsibility, DR 7-106 (C), which provides in pertinent part that:

> "In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> * * *
>
> (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of the accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein."

Applying these concepts to the acts here being condemned, it is our considered judgment that the prosecutor wilfully sought, and succeeded by this type of an argument, a conviction based on the jury's repose of confidence in her own private beliefs and opinions. This circumstance was aggravated by the rather remarkable attitude of the judge. Here we refer again to the

trial judge having subordinated his duty to insure that those on trial receive a fair trial to the prosecutor's penchant for ignoring certain basic rules of fairness. In this regard, see A.B.A. Standards, The Functions of the Trial Judge, 5.10, dealing with final arguments.

Our citing the above Standard emphasizes the mal-effect of the trial Judge's rejection of our objections to the prosecutor's characterization of our petitioner. This point becomes most compelling in the light of the wrongs rectified in the opinion of State v. Thomas, 33 Ohio App. 2d 7, affirmed 36 Ohio St. 882 (1973). In Thomas, it was recognized the trial judge's responses to objections can influence a jury's assessment of a witnesses' credibility. Here Earline Martin was the key witness in support of her defense, which further aggravates this situation. See United States v. Drummond, 481 F.2d 62 (2d Cir. 1973).

The response of the Supreme Court of Ohio to the above insuperable contentions was to remit this petitioner to the comfort of knowing the Judges of that Court had satisfied themselves from a reading of the cold Record, as a sort of appellate (or substitute) jury, that she would have in any event been found guilty. In other words, the fact that her credibility was totally destroyed by an argument the prosecutor had to know (and the trial Judge should have known) was wrong could be overlooked because they decided the jury would have in any event agreed with the prosecutor that she was lying in her evidence.

Aside from the fact that allowing a prosecutor to indulge in this type of gamesmanship was totally wrong, the further fact that these gross acts were directed at the heart of our petitioner's defense makes for an additional argument of compelling significance. Here we refer to the fact that the power of a jury to acquit "right in the teeth of both the law and

the facts", Horning v. District of Columbia, 254 U.S. 135, 138 (1920), was certainly a consideration that has so far been ignored here. This follows because jurors are simply not bound to follow what appears to be inescapable logic to appellate judges and prosecutors.

Given the above analysis, it seems clear enough from the harmless error position taken by the Ohio Supreme Court that they are now convinced the fundamentals of a fair trial need not be respected, indeed can be avoided with virtual impunity, if the proof persuades them of a defendant's guilt. What really punctuates the Ohio Court's flawed resolution of this issue is its mild reproofs of the prosecutor for her improper arguments, which were at least recognized by them as such (Appendix "A", at A 6 and Martin at 96). The same is true of the Court's total failure to credit the impact of the trial judges open and emphatic blessing of the remarks themselves.

In our view, the conclusion is inescapable that the jury may have gotten the impression from the judge's approval of these statements that the Court considered the prosecutor's tactics in this regard to be, both, necessary and proper.

Since the petitioner's credibility was absolutely vital to the persuasiveness of her self-defense evidence, one has to wonder how it could be said the prosecutor's argument that was made for the sole purpose of destroying the petitioner's credibility was harmless.

ARGUMENT NO. II

Where The Jury Is Given Conflicting Instructions And One (Or More) Of The Instructions Is A Prejudicially Incorrect Statement Of The Law, Due Process Is Violated Since The Jury May Have Been Misguided Thereby.

As argued below (Post, pp. 17 to 19) instructing the jury that they could not consider a lesser included offense unless they acquitted the accused of the higher offense was clearly wrong and indefensible (Keeble v. United States, 412 U.S. 205 (1973), Beck v. Alabama, 447 U.S. 625 (1980). On the other hand, and in amplification of the arguments referred to, we do concede the Court of Appeals isolated a segment of the overall charge, which they dubbed as being correct. This instruction was then said to have cleansed the entire charge.

Here it should be specifically noted that the trial court included in its instructions the following specific directions:

> If you find, ladies and gentlemen, that the State proved beyond a reasonable doubt all essential elements of aggravated murder, your verdict must be guilty of that offense and in that event, you will not consider any lesser offense.
>
> If you find that the State failed to prove that the offense was done with prior calculation and design, but that the offense was nonetheless purposely caused, you will proceed with your deliberations and decide whether the State has proved beyond a reasonable doubt the elements of the lesser offense of murder. [R. 692-693.]
>
> * * *
>
> If you find that the State proved beyond a reasonable doubt all essential elements of the lesser crime of murder,

> your verdict must be guilty of murder and in that event, you will not consider any lesser offense.
>
> If you find that the State failed to prove any of the essential elements of the offense of murder, you must find the Defendant not guilty of murder and you will proceed with your deliberation and decide whether the State has proved beyond a reasonable doubt the essential elements of the lesser offense of voluntary manslaughter. [R. 693-694.]
>
> * * *
>
> Basically speaking, look at the aggravated murder first. If you find the Defendant not guilty, then you go to murder. In the event that you deliberate as to murder, and making a good faith effort, you are unable to reach a verdict, then you go to the next step, the same thing, going on to voluntary manslaughter. (R. 698-699.)

The standard that must be used (and obviously was not used by our reviewing courts) in evaluating the constitutional challenge to these various instructions is whether a reasonable juror could have interpreted the given charge in a way, or fashion, inconsistent with the Constitution. Sandstrom v. Montana, 442 U.S. 510 (1979). This is so because a charge susceptible to such an interpretation by a reasonable jury so infects the trial at which it is a part that a conviction rendered subsequent to such charge cannot withstand due process attack, Cupp v. Naughton, 414 U.S. 141, 147 (1973). Thus even if the charge was also capable of being understood by a reasonable jury in a manner that comports with the Constitution, Leary v. United States, 395 U.S. 6, 31-32 (1969), it simply cannot be assumed this is actually what happened. Yet, our Supreme Court made the following specific determination in resolving this case against the petitioner:

> If, as in the case sub judice, the jury unanimously determines that defendant is guilty of the highest degree of the offense, it can be assumed that the jury

> has also considered and rejected evidence regarding self-defense and the lesser-included offenses.

Appendix "A", p. A 5, 21 Ohio St. 3d at 95.

The most patent errors in the above charges were precisely dealt with in our Court's decision in State v. Muscatello, 57 Ohio App. 2d 2310, Aff'd 55 Ohio St. 2d 201 (1978). Indeed, in Muscatello the Court specifically declared that it is prejudicially improper to instruct the jury that it must unanimously agree the accused is not guilty of aggravated murder before considering a lesser charge. State v. Muscatello, supra. Given this tenet, the State reviewing courts should have been hard pressed to even suggest that the instructions here being referred to could be regarded as harmless error beyond a reasonable doubt. Yet such is the impact of their decisions.

What emerges from any meaningful analysis of the various instructions here being centralized is that (even when they are read in the light of all the instructions given) they contain fatally serious flaws and self-contradictions. And, we know that self-contradictions within a judge's charge can never be harmless error. Again this follows because it is simply impossible to be certain the jury only followed and only relied on the "correct" segments of the instructions. See United States v. Walker, 677 F.2d 1014, 1016 n.3 (4th Cir. 1982), a case where the points made therein should be applied here full strength.

Despite the cogency of the above analysis it seems rather clear, to us at least, that the Court of Appeals somehow missed its thrust by convincing itself the segment of the charge it isolated, Appendix "B", infra, at p. A 10 fn. 1, (which arguably contained a correct statement of the law) did not give rise to any possibility for confusion even when considered in the light of the various inconsistent and contradicting segments that were

also in the charge. In our view, no court (including the Courts in Ohio) can rightly assume, with impunity, that a "lay jury will know enough to disregard the Judge's bad law if in fact he misguides them." Bollenbach v. United States, 326 U.S. 607, 613-614 (1946).

The outcome of this case turned in no small measure on the jury's understanding of the Court's jury instructions. Our Court of Appeals was content in finding no prejudice to the defendant because, in their judgment, the segment of the instruction isolated by them was said to be a correct exposition of the law. Significantly the Appellate Court failed to even articulate any recognition of the fact that their preferred segment of the Court's charge conflicted with other segments thereof. And, just as surely, they did not reckon with the fact that the jury could very well have followed those segments of the trial Court's charges which improperly told them not to consider the lesser included offenses (of murder and manslaughter) if they found the defendant guilty of the higher offense.

In our judgment, although obviously such is not the opinion of Ohio's Appellate Courts, telling the jury (as the trial judge did) that "if you find ... that the State proved ... aggravated murder, your verdict must be guilty of that offense and in that event, you will not consider any lesser offense" simply cannot be defended in law, logic or commonsense. Yet, the Ohio Supreme Court's response in this case was to oraculate that despite these catagorical instructions, which were clearly flawed, it could be assumed the jury proceeded correctly. Appendix "A", p. A 5, 21 Ohio St. 3d, at 95.

Our point here is really made by assigning, for analysis, the definition of murder plus mitigation to manslaughter (i.e., proof the accused was "under the influence of sudden passion or

sudden rage"). When viewed in this sense, telling the jury, as our Judge did, that if they found the defendant's act amounted to that of aggravated murder they should go no further, had the unavoidable effect of actually preventing the jury from giving due consideration to those additional, extenuating circumstances in the evidence that characterize manslaughter. The upshot of this is that the given instructions actually deprived the jury of a choice between murder and manslaughter.

This analysis leads inexorably to the conclusion that even if the Court had correctly charged the jury in the one segment of its charge isolated by the Appellate Court, with reference to the sequences involved in dealing with an aggravated murder charge and its lesser included offenses; the trial Judge having also given the jury a clearly erroneous instruction (one that told them not to even consider the lesser charge if they found guilt of the greater, as argued elsewhere in this petition) was a due process violation. Sandstrom v. Montana, supra.

This follows because even assuming the jury understood those segments of the Court's charge that dealt with the relationship of manslaughter to murder, it is extremely doubtful they perceived Earline Martin could have been guilty of voluntary manslaughter even if the State first proved she purposely caused the death of the decedent. This, of course, would be so if the evidence also showed the killing under those circumstances that make for a voluntary manslaughter offense.

Postured by these circumstances one must ask: is it even possible to conclude our jury (despite being told if they found the State proved all the elements of aggravated murder or murder the verdict should be rendered at that point [R 692-693] and that they should only look to see if some lesser charge was committed if they find her not guilty [ibid] or they were unable to agree

she was guilty of such offense [R 693-694]) nonetheless considered and rejected these lesser charges. Yet, this is precisely what the Supreme Court of Ohio actually held in this case, Appendix "A", p. A 4 - A 5, 21 Ohio St. 3d, at 94-95.

Hopefully, this Court will surely agree that where the evidence would support a verdict of both murder and manslaughter, the jury must be given the right to make the choice. Further, we know that in situations when a trial court fails to instruct on manslaughter, or any other lesser charges (where such an instruction is warranted), thus eliminating the element of choice from the jury's consideration, the accused must be given a new trial. So why not in this case?

In our view, the situation here is analogous to those cases where the trial court fails to instruct on the lesser charges when he should do so. When viewed in this sense, the jury instructions here being centralized must also be regarded as having had the unpardonable effect of eliminating, or taking away, from the jury the elements of choice by de-emphasizing the manslaughter and the other lesser charge. This deprived the petitioner of her right to have the jury make a choice in a situation where the evidence could have supported lesser charges. For this reason too, Earline Martin is entitled to a new trial.

ARGUMENT NO. III

Due Process Is Denied When The Trial Judge Instructs The Jury In Categorical Language That Only If They Found The Accused Not Guilty Of The Charged Offense (Here Aggravated Murder) Should They Even Consider Any Lesser Included Offenses And If They Found The Accused Guilty Of Such Offense They Need Not Consider Any Lesser Charge.

The Supreme Court of Ohio aptly posturing aspects of the issues here being raised credited the trial court with having instructed the jury "that it should not consider any lesser included offense if the jury first found the state had proved ... all of the elements of the offense of Aggravated Murder ....," State v. Martin, 21 Ohio St. 3d 91, at 92 (1986), Appendix "A", infra, p. A 2. Actually the given instructions were even stronger than that. For the jury was given what can only be viewed as mandatory directions with reference to the choices open to them. For here the Record also shows the trial court interspersed, intertwined and intertwisted, throughout his self-defense instructions, such unequivocal statements as:

> (a) "if you find ... that the state proved ... Aggravated Murder, your verdict must be guilty of that offense and in that event you will not consider any lesser offense."

(R. 692-693 [Emphasis supplied].) (Also see R. 693-694 and 698-699.)

Simply put, there is no way any assumption can cure the prejudicial misdirections (R.C. of Ohio, §2845.83[D]) to which reference is here being made. This follows because our jury was expressly told not to even consider any lesser offenses if they found the petitioner guilty of aggravated murder (R. 692-693).

Stated another way, to resolve this issue on the basis of the type of assumption referred to above would only be valid if the jury necessarily understood they should reject this clearly erroneous instruction. Thus, there is no way the Court below could validly conclude the jury actually resolved the inconsistency between these given instructions by actually rejecting the erroneous one.

Our conclusion in this regard becomes even more compelling when one realizes it is extremely doubtful, even assuming the jury fully understood the Court's charge (dealing with the relationship of manslaughter to murder and to aggravated murder), they perceived Earline Martin could have been found guilty of voluntary manslaughter even if the State first proved she intentionally caused the death of the decedent (with or without prior calculation and design) if the same was done under circumstances that made for the lesser charge.

At least this much seems to be beyond dispute, it is not possible to conclude this jury (after being told that if they found the State had proved the crime of aggravated murder their verdict should be guilty at that point and that they should only look to see if some lesser crime was committed if they first actually acquitted the accused of the greater charge) fully considered and rejected the included offenses of murder and manslaughter. On the other hand, even if a Court could possibly reason the jury ignored those instructions that were truly inconsistent, or at least rhetorically so, with the instructions required here, it simply does not seem possible that the charge as a whole could have left the jury with the correct understanding of the requirements of the law in this situation. See Sandstrom v. Montana, 442 U.S. at 518-519 n.7 and 525-526 and McFarland v. United States, 174 F.2d 538, 539 (D.C. Cir. 1949)

("... [i]f two instructions are in direct conflict and one is clearly prejudicial" a reversal is required.)

Despite the unassailable logic in the above analysis, the bottom line here is the Supreme Court of Ohio in addressing these specific issues did so on the basis of the following specific, totally indefensible, reasoning pattern:

> "When the jury has before it all the evidence and instructions for each offense, it is realistic to assume that the jury will not consider each offense in isolation from the others. If, as in the case sub judice, the jury unanimously determines that defendant is guilty of the highest degree of the offense, it can be assumed that the jury has also considered and rejected evidence regarding self-defense and the lesser-included offenses.

Appendix "A", infra, at A 4 - A 5, State v. Martin, 21 Ohio St. 3d, at 94-95. (Emphasis supplied.)

It is apparent from the above quote that the Judges on the Ohio Supreme Court, by a process of mystical reasoning, have concluded that it can be assumed the jury acted other than as they had been instructed, and actually rejected the included offenses before reaching the verdict in this case. However, the grim fact is suppositious conclusions and hypothetical guesswork of the type referred to above, as being dispositive of the serious issue here under consideration, is flawed almost beyond belief. For in addition to being an inherently incredible position for any Court to take, it ignores the fact that to have done what the Court is willing to assume happened is contrary to what the jury was specifically instructed to do.

All this being so, it will simply not do to say the jury must have considered the lesser charges because the Ohio Supreme Court is prepared to assume they did in their rush to affirm this conviction.

ARGUMENT NO. IV

A State Cannot Constitutionally Require An Accused Who Defends Against A Murder Charge On The Grounds Of Self-Defense To Prove Themselves Not Guilty.

We start our analysis here with an idea that is yet to be rejected by this Supreme Court -- that is, that a State may not, consistent with the due process clause, impose on a defendant in a criminal trial the burden of persuasion with respect to the plea of self-defense.

The federal constitutional limitations on the allocation of a particular burden of persuasion with reference to what a State may characterize as "affirmative defenses" derive from the rule articulated in In Re Winship, 397 U.S. 358, 364 (1970). There it was held that a criminal defendant may not be constitutionally convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime. Under this principle, an "affirmative defense" (such as self-defense) that brings into question, or seeks to negate, an element of the crime charged must, once sufficiently raised by the accused, be disproven beyond a reasonable doubt. Patterson v. New York, 432 U.S. 197, 202-205 (1977). The ultimate logic here, of course, was based on the idea that the State "may not place the burden of persuasion on [an] issue upon the defendant if the truth of the defense would necessarily negate an essential element of the crime charged." Holloway v. McElroy, 632 F.2d 605, 625 (5th Cir. 1980).

Counsel's serious disagreement with the ad hoc reasoning patterns relied on for the argument that the lack of self-defense is not an element of the charged offense should be viewed as total. Indeed, our position is that Patterson v. New York is

only properly regarded as dealing with defenses of mitigation, such as heat of passion and duress, which go only to the distinction between Murder and Manslaughter. Despite this indisputable fact, the majority opinions below simply refuse to reckon with the critical distinction between defenses in mitigation and those of justification -- such as a claim of self-defense.

Significantly, this Court in the Ohio case of Engle v. Isaac, 456 U.S. 107 (1982) rather pointedly credited our argument (-- that is, that the prosecution must disprove self-defense to establish mens rea, voluntariness, and unlawfulness) as raising "a colorable constitutional claim." Id., at 122 and n. 23. Also see Wynn v. Mahoney, 600 F.2d 448, 451 (4th Cir. 1979), where it was specifically noted that "The Supreme Court has not yet considered the proper allocation of the burden of proof with regard to self-defense." Indeed, in Hankerson v. North Carolina, 432 U.S. 233, 245 (1977), and Engle v. Issac, supra, the Court expressly articulated the idea that its disinclination to consider whether due process required proof of the lack of self-defense was because that issue was not properly before the Court. This being so, it is at once clear the issue as to the ultimate reach of Patterson can hardly be regarded as settled.

This analysis takes us then to the opinion made by our Supreme Court in State v. Martin, passim, which will surely be regarded by the Courts in Ohio as support for the flawed thesis that the State can with impunity constitutionally require an accused to prove they acted in self-defense. See, e.g., State v. Davis, 8 Ohio App. 3d 205 (1982). Cf., State v. Gideon, 52 Ohio App. 2d 70, 74 (1977). The fact that the supposed basis for this untenable position is said to be Patterson v. New York, is, of

course, rather startling. This is so because it can hardly be that Patterson is properly regarded as authorizing Ohio to punish as a murderer one who commits an entirely lawful act -- that is, kill another in self-defense. In any event, it is most difficult to understand how principles established in connection with the defense of duress can be deemed controlling in a self-defense analysis as was held to be the case in State v. Davis, supra, at 205.

A study of the Court's analysis (including the various cases relied on to defend its thesis) quickly shows it distills into an unconstitutional thesis. Simply stated, the clear cut indications are that the Court has somehow convinced itself that what is to be regarded as elements of any crime can be freely assigned by it or by the legislature. And, the Court must likewise be convinced that Patterson, although based on a gratuitous mitigation defense, controls even where the defense raised is an absolute one as distinguished from merely a partial defense.

Self-defense is not, of course, a confession and avoidance-type defense as was the case in Patterson. It is this fact that the Ohio Courts are apparently unwilling to fully credit. On the other hand, if our Courts are right, the State simply by the way it defines a particular crime can make an element out of the lack of intent, or the lack of an act, or even misidentification. Indeed, it can even make it a crime to kill in self-defense, something it has already come very close to doing, by making it an offense to purposely cause a death -- which is what happens in most self-defense homicide cases.

Granted, the elements of a particular offense should be prescribed by the statute itself. This is rightly the role of the legislature even though there is no doubt in anyone's mind

that our legislature's penchant is for making guilty verdicts as easy as is imaginable for juries to reach. Thus, the only protection left against outright tyranny when the same is indulged in by a prosecution-oriented legislature, or court, is the right of counsel to fearlessly challenge and appeal what he regards as a bad precedent.

For what its worth, it is fundamental due process that renders it impossible for either the Ohio legislature or its Courts to make it a crime to kill in self-defense. While this is certainly true, a majority of the members of both the Ohio Supreme Court and the Court of Appeals seem totally oblivious to the fact that this Court in Patterson, upon which they claim to rely, issued the warning that it did "not intend Mullaney" to be "[c]arried to its logical extreme ...." Patterson v. New York, 432 U.S. 197, 214-215, n. 15. Yet, history continues to show the Courts below are seemingly quite willing to take the Patterson rationale beyond its "logical extreme".

Our point here, simply put, is that if Ohio can require a defendant to prove self-defense simply by the way it defines the crime involved, and if self-defense can be properly analogized to the gratuitous defense involved in Patterson (which defense arguably could be totally eliminated by the simple device of abolishing the statute that created it), then it follows Ohio could eliminate the defense itself and make it a crime to kill in self-defense. If this is so, then surely this Court should make that point clear.

Prior to the Ohio Supreme Court's decision to review this case, counsel had routinely made the argument that it was most fortunate they had not ruled directly on the issue as to whether an accused can be required to prove himself not guilty when self-defense is raised. It was originally our hope that the Ohio

Supreme Court would surely credit the following insuperable analysis. First, the mere fact that one fires a gun and thereby kills another does not, alone, establish his guilt of any criminal offense. Next, "murder" and "manslaughter" are specific intent crimes. The intent involved in those crimes must be proven beyond a reasonable doubt by the prosecution. More simply put, the intent required to be proven must surely be a criminal intent. See United States v. Corrigan, 548 F.2d 879 (10th Cir. 1977). ("... The defense of self-defense is directed toward negating the element of criminal intent," id., at 883.)

Viewed in this light, it makes no sense to argue that one can rightly be required to prove that he lacked criminal intent or suffer a guilty verdict. Since the prosecution's burden is always to prove guilt (including the element of criminal intent) beyond a reasonable doubt, that burden is necessarily diluted unless the prosecution is required to prove the existence of such intent. Undeniably then, the criminal intent aspect of any felonious homicide is irreconcilable with self-defense. This being so, it follows that requiring one to disprove criminal intent offends fundamental criteria. Isaac v. Engle, 646 F.2d 1129, 1136 (6th Cir. 1980) (concurring opinion).

Based on the above analysis, what must be credited here is the fact that Earline Martin never contended she did not intend to shoot the decedent. Rather, it was maintained she shot without any criminal intent. See, Morissette v. United States, 342 U.S. 246 (1952), where this Court reasoned that the admittedly intentional act of taking certain government property could not be supposed by the Court to have been the only intent involved. Further, it was reasoned that the intent the accused admittedly had was only criminal if it was so determined after a

consideration of all the testimony (including the defense evidence that the taking had not been with any criminal intent) and all of the acts and circumstances surrounding the taking. Id., at 276. Also see, United States v. Gypsum Co., 438 U.S. 422, 429-430 (1978), and Holloway v. McElroy, 632 F.2d 605, 618 (5th Cir. 1980).

Even this is not all. Our Courts' reliance on Patterson, as authorizing the evisceration of the concept of self-defense, cannot survive for other equally cogent reasons. Here it should be noted the murder statutes under which Patterson was tried expressly provided:

> "[I]t is an affirmative defense (to murder) that: (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be."

People v. Patterson, 39 N.Y. 2d 288, 347 N.E. 2d 898, 900 n. 1 (1976). We also know from the State Court's opinion in the Patterson case that:

> "...[t]he [trial] court instructed the jury that '[t]he fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree.'
>
> The court went on to explain that '[t]his does not mean that the emotional disturbance exonerates the killer, or renders his killing guiltless. As long as he actually intended to cause the death of another person *** the killing remains a crime, and remains a homicide, but is punishable in less severe manner than murder."

Id., at 347 N.E. 2d, at 901.

It is clear then that only by resort to arbitrary reasoning patterns, such as those articulated in the Courts below, does one

fail to recognize there is no valid way to analogize the murder-manslaughter relationship created by the New York statutes with Ohio's murder and manslaughter statutes. In New York (and this was the point critically addressed in Patterson and made most clear by the above quotes from the jury charge given in the trial of Patterson) an accused by proving he acted under an extreme emotional disturbance only reduces his crime from murder to manslaughter, id., 432 U.S. at 205-206. For our part, it is this cogent point that most of the judges in Ohio simply refuse to reckon with.

Indeed, in our judgment, the point made by Judge Jackson, the dissenter below, could not be better stated than was done by him in State v. Wealthy Johnson (Court of Appeals, Cuy. Cty. No. 42846, unreported). There it was stated:

> "We live in a time of increasing violence and crime. Justice Rehnquist recently observed that the law enforcement authorities 'cannot protect the lives of employees of this very court [the United States Supreme Court] who live four blocks from the building in which we sit ....' Coleman v. Balkcom, [451] U.S. [949], 49 L.W. 3804, 3805 (dissent from denial of certiorari). Yet under the position taken by the majority any of these employees, even the Justices themselves, if attacked by a criminal who they killed in self-defense, would be required to prove their innocence. We are also informed that the police of this country are themselves endangered and forced to kill hundreds of individuals a year in self-defense. See Sherman, 'Execution Without Trial: Police Homicide and the Constitution', 33 Vanderbilt Law Rev. 71 (1980). Under the majority's concept of the issue each of the police are subject to indictment for murder and released only if they can prove their innocence. We know that individuals are assaulted daily in our city and that the use of self-defense may in many instances be the only way to preserve the life of the law abiding citizen. Yet, the clear import of the majority decision as I read it, holds that such a citizen, acting in

> self-defense, must carry the burden of proving that he acted in self-defense, or be found guilty. In my humble opinion, this is contrary not only to the Ohio and United States Constitutions, but also to logic and common sense.
>
> "I am reconciled to the possibility in the present judicial climate that the position of majority in the case at bar may prevail: that citizens will lose their inalienable right of self-defense, or that, when acting upon the lawful exercise of that right, they will be required to prove their innocence. Nevertheless, if that position does prevail, it will do so without my support and over my most vigorous dissent."

Id., Dissenting Opinion.

The point made above by our Judge Jackson really crystallizes the inaptness of the reasoning resorted to by our Appellate Courts. Obviously if the reasoning relied on by those Courts is sound, then this Court really ought to say so in no uncertain terms.

## CONCLUSION

It is certainly one thing to tell a jury that if the accused committed certain acts her crime would be murder but that they had the power to reduce the charge to manslaughter if the accused proved certain facts to mitigate the seriousness of her crime. And, it is another thing to tell the jury the accused has to prove her acts were not criminal and that she was justified in acting as she did to avoid suffering a murder conviction.

Under the instructions given in this case, despite the requirements of due process In Re Winship, 397 U.S. 358 (1970) and Mullaney v. Wilbur, 421 U.S. 684 (1975), Earline Martin was required to disprove the criminal intent element of the aggravated murder charge. And, she was required to contend with inconsistent and conflicting instructions. When these flaws are augmented by other errors and the prosecutor's egregious arguments to the jury, the conclusion that Earline Martin should be given another trial is really not even debatable since it cannot be avoided.

For all the above reasons, this Court should grant certiorari to the end that this cause can be reviewed and reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Writ of Certiorari was mailed to the office of John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this 25th day of February, 1986.

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